

JUL - 1, 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM DOCKET NO. 93-93
	)	
COMMUNITY TV OF	)	
SOUTHERN CALIFORNIA	)	FILE NO. BPET-881012KE
	)	
VALLEY PUBLIC TELEVISION, INC.	)	FILE NO. BPET-900904KE
	)	
For a Construction Permit for a	)	
New TV Station on Channel *39	)	
in Bakersfield, California	)	

To: Administrative Law Judge  
Arthur I. Steinberg

**MASS MEDIA BUREAU'S COMMENTS IN OPPOSITION TO JOINT  
PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT**

1. On June 18, 1993, Community Television of Southern California ("Community") and Valley Public Television, Inc. ("Valley") filed a Joint Petition for Approval of Settlement Agreement. The Mass Media Bureau submits the following comments in opposition to the Joint Petition.

2. The Settlement Agreement provides for, among other things: (1) the dismissal of both the Community and Valley applications without prejudice; (2) the dismissal by Valley of its Petition for Reconsideration of the grant of Community's application (File No. BPTT-910503AY) for a new television translator station on Channel 67 in Bakersfield, California; (3) the provision of noncommercial television service to Bakersfield by both parties on their respective translator facilities; and, (4) various agreements between Community and Valley, effective

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for a period of five (5) years, defining the areas in which each party may operate translator or low power television facilities and limiting the retransmission of their respective signals. The Agreement also prohibits Community and Valley from applying for a full service station to operate on Channel \*39 in Bakersfield for five years unless an independent third party files for such facility first. The Agreement is conditioned upon approval of the Agreement in its entirety.

3. Community and Valley emphasize that the critical condition of the Settlement Agreement is that both applications be dismissed without prejudice. They argue that the sole purpose of this condition is to enable either party to file during the twelve month period following dismissal if, and only if, a third party applies for Channel \*39. They contend that the presence of such a full service noncommercial television facility would upset the competitive balance they have achieved in Bakersfield.

4. The applicants recognize that pursuant to Section 73.3519 of the Commission's Rules, applications dismissed after designation are usually dismissed with prejudice, thereby precluding the refiling of the same or similar applications within 12 months. However, they note that Section 73.3568(c) permits dismissal without prejudice "upon a showing that the request is based on circumstances wholly beyond the applicant's control which preclude further prosecution of his application."

In support of their requests for dismissal without prejudice, Valley and Broadcasting state that the circumstance beyond their control is the possible filing of an application for Channel \*39 in Bakersfield by a third party.

5. Overall, the applicants submit that approval of the Settlement Agreement is in the public interest. Savings will be realized by the applicants and Commission by avoidance of a comparative hearing, and the settlement will insure continued translator service to Bakersfield. Additionally, each applicant has provided a declaration of a principal attesting that the applications were not filed for the purpose of settlement and that no consideration has been paid or received other than that specified in the Agreement.

6. The Bureau opposes grant of the Joint Petition and approval of the Settlement Agreement because of the Agreement's nonseverable requirement that dismissal of the respective applications be without prejudice. In the Bureau's view, Community and Valley have failed to meet the requirements for dismissal without prejudice pursuant to Section 73.3568(c). Specifically, they have failed to demonstrate circumstances wholly beyond their control which preclude further prosecution of their applications. Indeed, they have not demonstrated any circumstance warranting such relief. Rather, the circumstance they provide, namely, the possible filing within the twelve month

period of an application for Channel \*39 in Bakersfield, by a third party, is purely speculative. That possibility is not a matter which precludes the applicants from continuing further prosecution of their applications.

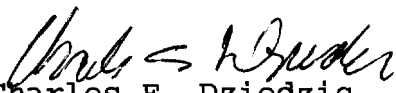
7. Community and Valley have also failed to demonstrate that waiver of the rules is warranted. An applicant seeking a waiver of a Commission rule "faces a high hurdle even at the starting gate." WAIT Radio v. FCC. 418 F.2d 1153, 1157 (1969), cert. denied, 409 U.S. 1027 (1971) When requesting a waiver, an applicant "must plead with particularity the facts and circumstances which warrant such action." Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (1968). Here, the applicants have failed to establish that the public interest will be served by a grant of a waiver of Section 73.3568(c) at this time. Specifically, if a third party were to file within the twelve month period, Community and Valley could refile their applications and seek waivers at that time. The Bureau would give due consideration to their requests. Similarly, the Bureau opposes waiver of Section 73.3519, because that too would be anticipatory and unwarranted at this time.

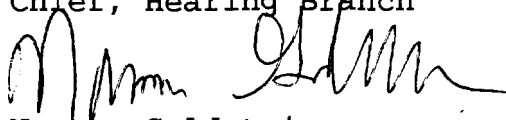
8. With the exception of the provision in the Settlement Agreement concerning dismissal without prejudice, the parties have complied with the requirements of Section 73.3525 of the Commission's Rules, which implements Section 311(c)(3) of the

Communications Act of 1934, as amended. Specifically, a copy of the Agreement has been timely filed, and the parties have established that approval of the Agreement will serve the public interest and that neither application was filed for an improper purpose.

9. Based on the foregoing, the Bureau opposes grant of the Joint Petition and approval of the Settlement Agreement, absent modification of the Agreement to provide for the deletion of the requirement that the dismissal of the applications be without prejudice. Cf. Intercontinental Radio, Inc., 62 RR 2d 1565 (1985).

Respectfully submitted,  
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July 1, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass

Media Bureau, South for about 3 years, on 10/10/10, Dec 15, July 1999